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ALEXANDER L. STEVAS
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No. 84-1880

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1984

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CITY OF ALCOA and DAVID SWITZER, manager of Blount Electric System and employee of the CITY OF ALCOA,

Petitioners,

vs.

ELIZABETH MYERS, on behalf of herself and her three minor children, DEBBIE LYNN DIXON, JOHN GARFIELD DIXON, JR., and CONNIE SUE DIXON,

Respondents.

—o—

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

—o—

RESPONDENTS' BRIEF IN OPPOSITION

—o—

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RESPONSE TO QUESTIONS PRESENTED

1. The Sixth Circuit's decision did not hold that a customer of a municipally owned public utility has a property right in receiving stolen electricity.

2. The Sixth Circuit held that a customer has a property right in receiving electricity from a municipally owned public utility and her service could not be terminated without any procedural safeguards to protect her right. The Sixth Circuit did not prohibit the public utility from removing from its line a meter not installed by the utility company and replacing with its own meter.

3. The Sixth Circuit can make determinations on issues of law pertaining to the public utility's liability.

TABLE OF CONTENTS

	Pages
Response to Questions Presented	ii
Table of Authorities	iii
Opinions Below	2
Jurisdiction	2
Constitutional Question Involved	2
Statement of the Case	3
Reasons for Denying the Writ	4
Argument:	
I. The Sixth Circuit has rendered a decision in conformity with the Court's holding in Memphis Light, Gas & Water Division v. Craft.	4
A. The Sixth Circuit has not rendered a decision that conflicts with the provisions of Tennessee Code Annotated.	6
B. The Sixth Circuit has not rendered a decision which conflicts with decisions of this Court regarding summary administrative action.	7
C. The Sixth Circuit has not rendered a decision of such general importance to the national law that this constitutional question should be settled by this Court.	9
II. The Sixth Circuit has rendered a decision in conformity with prior decisions of this Court and settled appellate practices of the United States Courts of Appeal.	10
Conclusion	12

TABLE OF AUTHORITIES

Cases	Pages
Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)	8
Farmer v. Nashville, 127 Tenn. 509, 156 S.W. 189 (Sup. Ct. 1912)	5
In re Hronek, 563 F.2d 296 (6th Cir. 1977)	11
Independent Bankers Association of America v. Heimann, 613 F.2d 1164 (D.C. Cir. 1979)	11
Jackson v. Davis, 530 F.Supp. 2 (E.D. Tenn. 1981) aff'd without opinion, 667 F.2d 1026 (6th Cir. 1981)	8
Levin v. Mississippi River Fuel Corp., 386 U.S. 162, 87 S.Ct. 927, 17 L.Ed.2d 834 (1967)	11
Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)	6, 8
Memphis Light, Gas & Water Division v. Craft 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978)	3,4,5,6,7,8,9,10
Morgan Guaranty Trust Company of New York v. Martin, 466 F.2d 593 (7th Cir. 1972)	11
Pullman-Standard v. Swint, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982)	11
Trigg v. Middle Tennessee Electric Membership Corp. 533 S.W.2d 730 (Tenn. App. 1975), cert. denied, (Tenn. S.Ct., March 15, 1976)	3, 4, 5
Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974)	8
Wulff v. Singleton, 508 F.2d 1211 (8th Cir. 1973)	11
Constitutional Provisions:	
U.S. Const. Amend. XIV	2, 7, 9
Statutes:	
United States:	
28 U.S.C. §1254(1)	2
42 U.S.C. §1983	2
28 U.S.C. §2106	11
Tennessee:	
Section 39-3-938	6,9
Section 39-3-939	6,9
Rules:	
Sup. Ct. R. 17	2

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To the Honorable Supreme Court of the United States:

Elizabeth Myers, on behalf of herself and her three minor children, Debbie Lynn Dixon, John Garfield Dixon, Jr., and Connie Sue Dixon, ("Myers"), pray that the Petition for a Certiorari to Review the Judgment of the United States Court of Appeals for the Sixth Circuit reported at 752 F.2d 196 filed in the above entitled case by the Petitioners, City of Alcoa and David Switzer, manager of the Blount Electric System and employee of the City of Alcoa, ("City"), on January 9, 1985, with an Order denying the Petition for rehearing entered on March 6, 1985, be denied.

OPINIONS BELOW

The City correctly present the status of the opinions below in their Petition for a Writ of Certiorari.

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JURISDICTION

The Judgment of the Sixth Circuit was filed on January 9, 1985. The Order denying the Petitioner for Rehearing was entered on March 6, 1985. The jurisdiction of this Court has been invoked under 28 USC 1254(a). The Petition for a Writ of Certiorari should be denied in accordance with Supreme Court Rule 17.

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CONSTITUTIONAL QUESTION INVOLVED

This 42 U.S.C. § 1983 case concerns the "property right" in the continued receipt of electrical service and procedural "due process" rights under the Fourteenth Amendment to the Constitution of the United States.

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STATEMENT OF THE CASE

The City accurately present the proceedings through the District Court level in their Statement of the Case. However, the City's summary of the Sixth Circuit's decision is erroneous and misleading. For these reasons, the Statement of the Case is corrected with the following summary to describe the Sixth Circuit proceedings.

On appeal, the Sixth Circuit reversed the summary judgment awarded to the City. The Sixth Circuit based its decision upon the Tennessee law announced in Trigg v. Middle Tennessee Electricity Membership Corp., 533 S.W.2d 730 (Tenn. App. 1975), cert. denied, (Tenn. S.Ct. March 15, 1976) [hereinafter referred to as Trigg] and interpreted by this Court in Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 98 S. Ct. 1554, 56 L.Ed.2d 30 (1978) [hereinafter referred to as Craft]. The Sixth Circuit held that a recipient of electric service in Tennessee has a property right in the continuation of electric service because it cannot be terminated except "for good and sufficient cause." The property interest was the right to receive continued electrical service, for which Myers was willing to pay, and not the right to any tangible property (such as the meter itself).

Myers' rights were violated when her service was terminated without any procedural safeguards to protect her right. The Sixth Circuit followed the holding in Craft instructing that, at a minimum, Myers should have been afforded notice of the proposed termination and opportunity to discuss the theft with the utility in an effort to resolve the problem before the scheduled termination. The Sixth Circuit's holding did not prevent the City from removing a stolen meter without a pretermination hearing. Alternatively, it was held that the City would not have created a hazard or violated the law by removing the stolen meter, providing another meter, and resuming service to Myers. The case was reversed and remanded with instructions to enter an order accordingly and to determine the damages, if any, to which Myers were entitled.

A Petition for Rehearing was filed by the City. The City argued that the Sixth Circuit decided an issue which was not before it on appeal: the lack of knowledge of the theft device based upon the hearsay acquittal of the state criminal charge. The City further alleged that the decision of the Sixth Circuit deprived the City of its right to offer proof on the questions of both liability and damages. On March 6, 1985, the Sixth Circuit denied the Petition to Rehear. Judge Wellford concurred with the original opinion in this case that the District Court erred in granting the City's Motion for Summary Judgment. Judge Wellford stated that it is clear that Craft establishes a property interest in continued service and it was error to conclude that Myers had no property interest that deserved due process protection. However, Judge Wellford agreed with the City's contention that the case should be remanded for disposition on all issues, including the District Court making an initial determination of how much process was due and whether that standard was violated.

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REASONS FOR DENYING THE WRIT

I.

THE SIXTH CIRCUIT HAS RENDERED A DECISION IN CONFORMITY WITH THIS COURT'S HOLDING IN MEMPHIS LIGHT, GAS & WATER DIVISION V. CRAFT.

The Sixth Circuit has simply followed the previous holding in Craft by this Court. The City's continued failure to understand the holding in Craft explains its inability to understand the Sixth Circuit decision. The City, in its brief at page 6, footnote 3, contends that Craft and Trigg stand for the proposition that a utility company is permitted to terminate service at will "if there is cause." Clearly, the City's interpretation contradicts itself and finds no support in Craft which reaffirmed that "[s]tate law does not permit a public utility to terminate service at will." Craft, 436 U.S. 1, 10.

This Court in Craft turned to Tennessee law announced in Farmer v. Nashville, 127 Tenn. 509, 515, 156 S.W. 189, 190 (Sup. Ct. 1912) and upheld in Trigg, 533 S.W.2d 730, 733, for a definition of the property right involved with regard to continued utility service. This Court held that:

> Because petitioners may terminate service only "for cause," respondents assert a "legitimate claim of entitlement" within the protection of the Due Process Clause. Craft, 436 U.S. 1, 11.

The City's argument attempts to avoid the force of the essential holding in Craft that a property right exists in the continued receipt of electricity. The City states that Trigg and Craft do not prevent a utility company terminate service for cause. [City's Brief, p. 6]. Clearly, these decisions recognize a customer's protected interest and the need for a due process hearing when the customer disputes the reason for termination. Craft, 436 U.S. 1.

Finally, it must be brought to this Court's attention that beginning in the Statement of the Case and throughout the petition for a Writ of Certiorari, the City mischaracterizes the Sixth Circuit decision as holding a customer of a municipally owned public utility has a property right in "stolen" electricity. The continual utilization of the term "stolen" electricity by the City incorrectly describes the Sixth Circuit decision.[1] The Sixth Circuit recognized that Myers continually claimed her lack of knowledge and participation in the removal and replacement of meter assigned to her. Additionally, there is nothing in the record from which it can be inferred that Myers refused to pay the reasonable estimated value of electricity consumed at her residence during the period in question. Moreover, the Sixth Circuit never held that they recognized a right in "stolen" electricity. The City makes no reference to any language in the Sixth Circuit decision to support this contention and carefully avoids recogni-

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1 The City objects to the consideration by the Sixth Circuit of the City's admission of Myers acquittal at the criminal trial of the criminal charges of the theft of the meter and electricity. However, the City continues to impute criminal intent and theft upon Myers with its use of the term "stolen" electricity.

tion of the Sixth Circuit discussion of the issue of stolen property. The Sixth Circuit held that the Myers' "property interest at stake was the right to receive continued electrical service, for which she was willing to pay, and not the right to any tangible property (such as the meter itself)." [City's Brief, App. 7] The City's characterization of the Sixth Circuit's decision is erroneous and misleading.

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A. THE SIXTH CIRCUIT HAS NOT RENDERED A DECISION THAT CONFLICTS WITH THE PROVISIONS OF TENNESSEE STATUTES.

There is no conflict between the decisions of Craft and the Sixth Circuit with the Tennessee statutes. The City's contention that the Sixth Circuit ignored the law in Tennessee dealing with diversion of electric power in Sections 39-3-938 and 39-3-939 of Tennessee Code Annotated is without merit.

The Sixth Circuit recognized Tennessee law, with specific reference to the provisions in the Tennessee statutes regarding charges of theft of power. In discussing the "risk of erroneous deprivation" result under the due process standard set forth in Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed. 2d 18 (1976), the Sixth Circuit made reference to the civil remedies available to the City under Tennessee Code Annotated §§ 39-3-938 and 39-3-939. They can pursue civil remedies, including treble damages for electricity which has been pirated. Thus, the City has adequate remedies to protect its interest under the Tennessee statutes and this was clearly recognized by the Sixth Circuit.

The City argues that the probability of erroneous deprivation is nonexistent in this case. [City's Brief, p. 9]. As stated by the Sixth Circuit, the probability of erroneous deprivation is self-evident. As was determined at the criminal trial four months after her electrical service was disconnected and admitted by the City, Myers was not guilty of the theft of electricity. The Sixth Circuit held the risk of erroneous deprivation under the City's "current

system is great to the customer, while virtually a nullity as far as the defendant supplier is concerned." [City's Brief, App. 6]. The Sixth Circuit recognized the alternative remedies available to the City to protect its interests through the Tennessee Code sections. The decisions of Craft and the Sixth Circuit are consistent in their protection of the City's interest and the consumer's rights under the Fourteenth Amendment.

There is no conflict between the remedies and provisions of the Tennessee Code and the Sixth Circuit's decision. There is a conflict between the City's actions of depriving utility services for four months without a hearing and the Fourteenth Amendment to the United States Constitution. The City's own remedy of punishing a customer with deprivation of essential utility services is precisely the type of action that the Fourteenth Amendment and Craft prohibit. Additionally, the Tennessee statutes do not permit the type of punishment levied by the City in withholding of essential utility services for four months until Myers obtained her acquittal. The due process rights of citizens were not eliminated by the criminal statutes. These provisions do not provide authority for the City to terminate and withhold essential services without providing a customer the opportunity to respond to the charges of theft.

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B. THE SIXTH CIRCUIT HAS NOT RENDERED A DECISION WHICH CONFLICTS WITH DECISIONS OF THIS COURT REGARDING SUMMARY ADMINISTRATIVE ACTION.

The City argues that the Sixth Circuit ignored case authority from this Court regarding summary administrative actions that are proper by governmental entities without a pretermination due process hearing. The City parades a list of cases to this Court for its contention that it should be allowed to summarily terminate utility services. The Sixth Circuit stated that the City's use of telephone cases were a poor analogy to support this summary administrative action and reminded the City that the termination of telephone service does not usually create the same health hazard as termination of water or electricity.

As stated in Craft, this Court took judicial notice that "[t]he customer's interest is self-evident," as "[u]tility service is a necessity of modern life," the discontinuance of which "for even short periods of time may threaten health and safety." Craft, 436 U.S. 1, 18. Clearly, this Court recognized the important property interest involved with utility services necessitating due process protections. Moreover, the general rule is that before an individual is deprived of a significant property interest, he must be afforded an opportunity for a hearing. Board of Regents v. Roth, 408 U.S. 564, 569, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Wolff v. McDonnell, 418 U.S. 539, 557-558, 94 S. Ct. 2963, 41 L.Ed.2d 935 (1974).

The City contends that the three pronged test of Mathews, supra, was ignored or misapplied by the Sixth Circuit [City's Brief, p. 10]. This argument is without merit and ignores the thorough consideration of Mathews by the Sixth Circuit in its decision. [This discussion by the Sixth Circuit can be reviewed in City's Brief, App. 5-7]. Clearly, as found by this Court in Craft, the termination of utility services require some kind of procedural safeguards when there is a dispute over the cause for termination. Craft, 436 U.S. 1, 18.

The City concludes with its lament that the Sixth Circuit's decision prevents them from stopping the commission of a continuing crime. [City's Brief, p. 12-13]. The City continues to allege that Myers was committing the crime of stealing electricity and failure to terminate services would have allowed a crime to continue. This argument was raised previously by the City when it cited the case of Jackson v. Davis, 530 F.Supp. 2 (E.D. Tenn., 1981), aff'd without opinion, 667 F.2d 1026 (6th Cir. 1981). The Sixth Circuit's holding does not constitutionally require a due process hearing before a utility company may stop the commission of a continuing crime. The Sixth Circuit held that Myers disputed the cause for termination (she denied she was stealing electricity or stole the City's meter) and the City would not have created a hazard or violated the law by resuming service if it had provided another

meter. Clearly, the City could simply replace the foreign meter with another meter and provided notice of a due process hearing within the next day or two regarding its allegation of theft by Myers. The City admitted that it has a hearing mechanism in place for disputed bill issues. [City's Brief, App. 24]. Instead the City removed the stolen meter without replacement for four months and without providing a due process hearing. Finally, the Sixth Circuit noted that this is not a case involving a continued illegality because Myers informed the City of her intent to continue to pay for the service.

C. THE SIXTH CIRCUIT HAS NOT RENDERED A DECISION OF SUCH GENERAL IMPORTANCE TO THE NATIONAL LAW THAT THIS CONSTITUTIONAL QUESTION SHOULD BE SETTLED BY THIS COURT.

The Sixth Circuit has merely restated the clear holdings in Craft that a property right exists in the continued receipt of electricity. Myers should have been afforded notice of the proposed termination and the opportunity to discuss the theft with the utility in an effort to resolve the problem before the scheduled termination. Myers disputed that she had knowledge or participated in the entire affair. Her rights were violated when her service was terminated without any procedural safeguard to protect her rights.

The Sixth Circuit's decision does not prevent a utility company stopping crime. The City was provided options, including the opportunity to remove he stolen meter and replace it with its own meter without any interruption of ervice. Additionally, the City could have charged Myers the reasonable value an estimated amount of electricity consumed at her residence during the per- in question. The City has never alleged that this could not be done. arly, the City could have held a due process hearing after notice under its ring mechanism already in place with no additional burden. [City's Brief, . 6, 19].

The City's allegation of the impact on Tennessee's criminal statutes and other states is without merit. As the Sixth Circuit reminded the City, there are adequate provisions under the statute for remedies to the utility companies. Tennessee Code Annotated § 39-3-938 and § 39-3-939. The Sixth Circuit does not prevent the City or utility companies in other states from terminating service after a due process hearing or pursuing remedies under the criminal statutes. There is no conflict in the Tennessee statutes with Craft, the Fourteenth Amendment, or the Sixth Circuit decision. Moreover, there is not any conflict that the City can pinpoint in other states that supports its claim of such general importance to the national law.

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II.

THE SIXTH CIRCUIT HAS RENDERED A DECISION IN CONFORMITY WITH PRIOR DECISIONS OF THIS COURT AND SETTLED APPELLATE PRACTICES OF THE UNITED STATES COURTS OF APPEAL.

The Sixth Circuit's holding is in conformity with the practice of the Court of Appeal and this Court. The City argues that the Sixth Circuit could not decide what process was due. This Court in Craft provided the minimum standards of due process. These standards, as a matter of law, were violated by the City's own admission. It is undisputed that no due process hearing or any procedural safeguards were afforded to Myers. Craft, instructs that at a minimum, Myers should have been afforded notice of the proposed termination and the opportunity to discuss her lack of knowledge and participation in the theft with the utility in an effort to resolve the problem before the scheduled termination. Craft, 436 U.S. 1, 18. The City admitted and stipulated that it afforded no notice or opportunity for a hearing to Myers prior to the termination of utility services. [City's Brief, App. 17]. Therefore, due process was not provided as a matter of law.

This admission and undisputed fact permits the Sixth Circuit to simply reverse and remand with instructions to the district court to determine the damages, if any, to which Myers may be entitled. The authority relied upon by the City for a remand are only persuasive when a factual dispute exists between the parties. The record below reflects no disputed issue of fact. Judicial economy requires the appellate court to dispose of the matter when the correct resolution is clear. Levin v. Mississippi River Fuel Corp, 386 U.S. 162,, 170, 87 S. Ct. 927, 17 L.Ed.2d 834 (1967); In re Hronek, 563 F.2d 296, 298 (6th Cir. 1977); Wulff v. Singleton, 508 F.2d 1211, 1214 (8th Cir. 1975). The record permits only one resolution of the factual issue and the appellate court may make the appropriate finding without a remand. Pullman-Standard v. Swint, 456 U.S. 273, 292, 102 S. Ct. 1781, 72 L.Ed.2d 66 (1982). Moreover, the Sixth Circuit has the power to dispose of the matter under 28 U.S.C. § 2106, particularly, as in the instant case, where the parties cross moved for summary judgment in the lower court and the relevant legal questions have been fully briefed and argued on appeal. Independent Bankers Association of America v. Heimann, 613 F.2d 1164, 1167 (D.C. Cir. 1979); Morgan Guaranty Trust Company of New York v. Martin, 466 F.2d 593, 599 (7th Cir. 1979).

The City also complains of not being provided the opportunity to offer proof on the liability question at trial. It is ironic that the City requests this opportunity while it maintains that Myers should not be provided the opportunity to dispute her liability. The critical difference is that Myers disputes her culpability while the City has admitted their liability. The City has admitted that no notice or opportunity of a hearing was provided, utility services were discontinued, and the resumption of services was refused. The requirements of due process minimal standards have been violated by the City and the Sixth Circuit has the power to grant summary judgment in favor of Myers.

The Court of Appeals has ruled in conformity with the decisions of this Court and other Courts of Appeal.

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CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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I, Gary D. Housepian, counsel for the Respondents, and a member of the Bar of the Supreme Court of the United States, do hereby certify that three (3) copies of the Supplemental Affidavit was mailed, first-class postage prepaid to Carl P. McDonald, counsel for City of Alcoa and David Switzer at his offices at First Tennessee Bank Building, Maryville, Tennessee 37803, and three (3) copies to Carlos C. Smith, counsel for Amicus Curiae, 400 Krystal Building, One Union Square, Chattanooga, Tennessee, 37402, and that all parties required to be served have been served, this 5th day of July, 1985.

Gary D. Housepian

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